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# ESSAY

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## APPLAUSE FOR THE PLAUSIBLE

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### INTRODUCTION

Why has the word “plausible” come to define federal civil litigation? In recent years, the U.S. Supreme Court supplemented longstanding pleading standards under the Federal Rules of Civil Procedure, which require a “short and plain statement of the claim,”<sup>1</sup> to additionally require that all civil pleadings state a claim that is “plausible.”<sup>2</sup> In *Bell Atlantic Corp. v. Twombly*, the Court rejected other possible words that might describe the newly tightened pleading standard, such as “reasonable” or “probable.”<sup>3</sup> To the dismay of many judges, lawyers, and other observers, the Court did not define “plausible,” except to add that “plausible” pleadings “nudge[] their claims across the line from conceivable to plausible.”<sup>4</sup> In *Ashcroft v. Iqbal*, the Court again did not define “plausible,” except to assert that a “plausible” claim must not be “conclusory” in nature.<sup>5</sup> This Essay explores the complex and contradictory meanings of the word “plausible.”

Furthermore, this Essay applauds the Supreme Court’s selection of such an equivocal and conflicted word as the gateway to federal civil litigation.

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<sup>1</sup> FED. R. CIV. P. 8(a)(2).

<sup>2</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

<sup>3</sup> *See Iqbal*, 556 U.S. at 678 (“The plausibility standard is not akin to a ‘probability requirement’ . . .”).

<sup>4</sup> *Twombly*, 550 U.S. at 570.

<sup>5</sup> *Iqbal*, 556 U.S. at 681.

As I describe below, “plausible” means “fair” or “reasonable,” but perhaps only in a superficial sense; what is “plausible” might in fact be “specious” or used as a “pretext.”<sup>6</sup> The word is immune to careful definition. Because of its ambiguity, it was well selected to expand judicial discretion to dismiss civil cases. In specific areas of federal civil litigation, the Court has recently broadened judges’ discretion to dismiss a wide range of civil petitions: civil rights claims, habeas petitions, class action certification petitions, and more.<sup>7</sup> In those contexts, the Court uses words like “reasonable” in ways that bend their meaning, suggest more objectivity than warranted, and create genuine confusion between doctrines by using the same word in different ways.

Despite substantial confusion over the choice of the word “plausible” to govern pleading in federal civil litigation, at least one can say that the word itself captures the essence of the problem rather than disguising it. Whether the resulting discretion conferred on district judges is itself warranted or desirable is a very different question, and a matter of real concern. Because “plausibility” pleading enhances judicial discretion, the meaning of “plausible” may increasingly depend on judicial practice and the litigation contexts where the word is used. Nonetheless, rather than viewing the word selection as an accident or a misplaced reference, I suggest that the word was deliberately chosen to be deeply . . . plausible.

## I. PLAUSIBLE DEFINITIONS

When Justice Souter, *Twombly*’s author, saw how *Iqbal* would expand his concept of “plausibility” pleading two years later, he was driven to envision space aliens. He argued in a vigorous dissent that judges should dismiss for “plausibility” reasons only “sufficiently fantastic” pleadings—like those involving extraterrestrials, “the plaintiff’s recent trip to Pluto, or experiences in time travel.”<sup>8</sup> Thus, Justice Souter opined that the majority’s interpretation of “plausible” was a “fundamental misunderstanding.”<sup>9</sup>

Given the Supreme Court’s own struggle to define “plausible,” it is no surprise lower courts have adopted a range of interpretations when struggling with the new “plausibility” standard.<sup>10</sup> Scholars have similarly thrown up

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<sup>6</sup> See *infra* Part I.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> *Iqbal*, 556 U.S. at 696 (Souter, J., dissenting).

<sup>9</sup> *Id.* at 695.

<sup>10</sup> See generally Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 520-26 (2009) (highlighting the Third and Tenth Circuits’ opaque tests, as well as the Second and Seventh Circuits’ “sliding-scale” approach).

their hands.<sup>11</sup> Professor Alex Reinert rightly describes the confusion created as partly “linguistic,”<sup>12</sup> while Professor Arthur Miller notes that “inconsistent rulings on virtually identical complaints may well be based on individual judges having quite different subjective views of what allegations are plausible.”<sup>13</sup> Similarly, Professor Tung Yin calls the Court’s definition itself “peculiar, if not implausible,”<sup>14</sup> and Professor Patricia Hatamyar comments that “[a]t this point, the law of pleading consists of pronouncements worthy of Lao-tzu.”<sup>15</sup>

“Plausibility” does not require heightened pleading, except that it does. Judges are not to weigh evidence, except that they must: after all, “plausible” was previously used by the Court in the summary judgment context.<sup>16</sup> Deciding what is a “mere conclusion”<sup>17</sup> and what is a factual assertion to be weighed raises difficult questions; after all, “one person’s ‘conclusion’ is another person’s ‘fact.’”<sup>18</sup> Furthermore, many allegations raise mixed questions of law and fact.

Although few scholars or judges have discussed the definition of “plausible,” scholars have generally disapproved of the word choice. Professor Louis Kaplow, one of the few to dwell on the definition, notes: “As a matter of clarity in communication, it is unfortunate that the Court chose as its key term one having as a standard definition the very notion it meant to reject.”<sup>19</sup> When in doubt, judges may turn to dictionary definitions of

<sup>11</sup> For a sampling of the voluminous critical literature, see, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 831 (2010) (“[T]he Court’s route to *Iqbal*’s result, built on *Twombly*’s trail, will mess up the civil litigation system.”); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 459 (2008) (“[T]he Court’s plausibility standard may require different levels of factual detail depending upon the substantive context.”). See also *infra* notes 12-15, 19 and accompanying text.

<sup>12</sup> Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 1-2 (2012).

<sup>13</sup> Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 30 (2010).

<sup>14</sup> Tung Yin, “*I Do Not Think [Implausible] Means What You Think It Means*”: *Iqbal v. Ashcroft and Judicial Vouching for Government Officials*, 14 LEWIS & CLARK L. REV. 203, 204 (2010).

<sup>15</sup> Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 583 (2010). See generally *id.* 583, n.197 (sampling the perplexing and self-contradictory aphorisms found in the TAO TE CHING, a classic Chinese text).

<sup>16</sup> See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986) (“[T]he absence of any *plausible* motive to engage in the conduct charged is highly relevant to whether a ‘genuine issue for trial’ exists within the meaning of Rule 56(e).” (emphasis added)).

<sup>17</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009) (“A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth.”).

<sup>18</sup> Hatamyar, *supra* note 15, at 566.

<sup>19</sup> Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1256 n.187 (2013); see also Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 14 (2008) (“[T]he use of the

words; however, as some judges recognize, dictionary definitions may not be helpful when more than one definition is “plausible.”<sup>20</sup> Some judges have tried unsuccessfully to fix meaning to the word “plausible” using dictionary definitions. For example, one dissenting judge in an Eleventh Circuit opinion noted: “Synonyms for ‘plausible’ include ‘credible,’ ‘creditable,’ ‘likely,’ ‘believable,’ ‘presumptive’ and ‘probable.’”<sup>21</sup> In another case, when a doctor was asked to testify about medical “plausibility,” the doctor answered: “Plausible ... is a very vague term. It’s a hypothetical possibility.”<sup>22</sup>

Confusion notwithstanding, “plausible” has a range of definitions that shed light on the task for which the word has been so recently elevated by the Supreme Court. Take for example, these three definitions from the Merriam-Webster Dictionary: “plausible” means (1) “superficially fair, reasonable, or valuable but often specious <a *plausible* pretext>,” (2) “superficially pleasing or persuasive <a swindler..., then a quack, then a smooth, *plausible* gentleman — R. W. Emerson>,” or (3) “appearing worthy of belief <the argument was both powerful and *plausible*>.”<sup>23</sup> Indeed, in the *Twombly* opinion, later reversed by the Supreme Court, the Second Circuit noted that, in another context, the Ninth Circuit had employed a definition of “plausible” from an early edition of Webster’s Dictionary: “superficially worthy of belief: CREDIBLE.”<sup>24</sup>

Other dictionary definitions convey similarly contradictory meanings. None suggests a fixed or objective measure of truth or accuracy. If anything, dictionary definitions of “plausible” imply a lack of objective measures. The MacMillan Dictionary defines “plausible” as “likely to be true” or “able to be considered seriously for a particular job or purpose.”<sup>25</sup> The Oxford

term *plausible* to describe the heightened pleading standard seems like an odd choice.” (emphasis in original)). *But see* Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 209 (2010) (explaining that the Court’s use of “plausible” comports with the word’s dictionary definition).

<sup>20</sup> See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 651 n.6 (2004) (“[E]ither definition of ‘accident’ is at first glance plausible . . .”).

<sup>21</sup> *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1346 (11th Cir. 2010) (Ryskamp, J., dissenting).

<sup>22</sup> *Althen v. Sec’y of the Dep’t of Health & Human Servs.*, 58 Fed. Cl. 270, 283 (Fed. Cl. 2003) (ellipsis in original).

<sup>23</sup> *Plausible*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/plausible> (last visited Apr. 8, 2014) (emphasis and ellipsis in original).

<sup>24</sup> *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 111 n.5 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007) (quoting *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 664 (9th Cir. 2003) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1736 (Philip Babcock Gove & The Merriam-Webster Editorial Staff eds., 1976 ed.))).

<sup>25</sup> *Plausible*, MACMILLAN DICTIONARY, <http://www.macmillandictionary.com/us/dictionary/american/plausible> (last visited Apr. 8, 2014).

Dictionary defines “plausible” as “seeming reasonable or probable.”<sup>26</sup> These dictionaries also include definitions suggesting that “plausible” connotes the opposite of the truth. The Oxford Dictionary, for example, adds that, when used as an adjective for a person, “plausible” can mean “skilled at producing persuasive arguments, especially ones intended to deceive: *a plausible liar*.”<sup>27</sup> The word’s superficial and possibly negative connection to accuracy is built into its meaning.

*Black’s Law Dictionary* has no definition of “plausible,” because it is not a word that has gained accepted legal usage—unlike “reasonable,” “probable,” and some others. Common legal parlance implies that a “plausible” argument is not yet fully formed. At the pleading stage, facts are alleged and not yet proven, and requiring only “plausible” allegations may be appropriate; however, that again depends (1) on whether a “plausibility” standard requires some degree of accuracy attached to the allegations, and (2) if it does, on the degree of accuracy required. Without defining the word, *Black’s Law Dictionary* suggests a definition elsewhere, in its definition of “colorable,” a synonym for “plausible” in legal parlance: “That which is in appearance only, and not in reality, what it purports to be, hence counterfeit, feigned, having the appearance of truth.”<sup>28</sup> However, a plaintiff would not want to embrace this definition’s connotation that what is “plausible” on the exterior disguises a claim “not in reality.”

In contrast to the current “plausibility” pleading standard, the prior notice-pleading standard did not purport to address factual support for claims at all, and thus avoided the difficulty of determining when facts were sufficiently “plausible.”<sup>29</sup> Having decided to test factual allegations, perhaps the word “plausible”—with its equivocal meanings—accurately conveys the most realistic expectations for judges ruling at the pleading stage, when allegations are assumed to be true. Further, the word’s evasive meaning explains why so few courts have relied on dictionary definitions—and perhaps why the Court declined to provide a definition for “plausible” in *Twombly* and *Iqbal*.

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<sup>26</sup> *Plausible*, OXFORD DICTIONARY, [http://oxforddictionaries.com/us/definition/american\\_english/plausible](http://oxforddictionaries.com/us/definition/american_english/plausible) (last visited Apr. 8, 2014). Regardless, the Court was clear it was not adopting a “probability” measure when it selected the “plausibility” standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); see also *supra* note 3 and accompanying text.

<sup>27</sup> *Plausible*, *supra* note 26 (emphasis in original).

<sup>28</sup> BLACK’S LAW DICTIONARY 265 (6th ed. 1990).

<sup>29</sup> See, e.g., *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002) (explaining that the “simplified notice pleading standard” under the Federal Rules of Civil Procedure “relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims”)

## II. PLAUSIBLE PEOPLE

The choice of the word “plausible” brings with it cultural associations, including longstanding use in literature to refer to people who are superficial. This Part describes a few well-known literary examples in which the authors used “plausible” to describe unsavory people who use false appearances to take advantage of others. They show how, despite our efforts to assess people’s truthfulness, our lie-detecting skills are limited—as is our information about the people being judged. The anxiety generated by these literary characters mirrors that faced by judges, who must now—with only preliminary representations by the parties—assess the plausibility of allegations made in litigation.

The full Emerson quotation excerpted in the Merriam-Webster Dictionary<sup>30</sup> is wonderful and apt:

So each man, like each plant, has his parasites. A strong, astringent, bilious nature has more truculent enemies than the slugs and moths that fret my leaves. Such an [sic] one has curcilioes, borers, knife-worms: a swindler ate him first, then a client, then a quack, then smooth, plausible gentlemen, bitter and selfish as Moloch.<sup>31</sup>

This strong, astringent person, beset by clients but also by the “quack” and the “plausible gentlemen,” sounds like a lawyer with an active civil practice.

Charles Dickens, in a more caustic and lengthier parody, discusses the “plausible gentleman” and the “plausible lady” as “a plausible couple.”<sup>32</sup> Such a couple are “people of the world,” and “while the plausible couple depreciate, they are still careful to preserve their character for amiability and kind feeling; indeed the depreciation itself is often made to grow out of their excessive sympathy and good will.”<sup>33</sup>

William Shakespeare uses an archaic form, “plausive,”<sup>34</sup> to refer to a display of public manners by a person who may not be what he seems, and also to refer to powerful and deeply felt expressions. Hamlet describes the

<sup>30</sup> See *supra* note 23 and accompanying text.

<sup>31</sup> RALPH WALDO EMERSON, *ESSAYS AND POEMS* 387 (Barnes & Noble Classics 2004).

<sup>32</sup> CHARLES DICKENS, *The Plausible Couple*, in *SKETCHES OF YOUNG LADIES, YOUNG GENTLEMEN, AND YOUNG COUPLES* 54, 56-57 (London, Chapman & Hall 1843), available at <http://www.dickens-online.info/sketches-of-young-couples-page19.html>.

<sup>33</sup> *Id.* at 55, 60.

<sup>34</sup> See *Plausive*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/plausive> (last visited Apr. 8, 2014) (defining “plausive” to mean both “pleasing” (in obsolete uses of the word) and “specious” (in archaic uses)).

“form of plausible manners” that appear to mark some men with a “defect.”<sup>35</sup> In contrast, the King in *All’s Well That Ends Well* describes his old friend’s “plausible words,” that not only rang true, but also were “scatter’d not in ears, but grafted [there], [t]o grow.”<sup>36</sup>

The word’s origins trace back to the Latin *plausibilis*, which means “worthy of applause.”<sup>37</sup> Perhaps that Latin root gets it best. We may applaud something that is superficially pleasing when it is a show, a spectacle, or in literature. However, we do not applaud something that is the work of a “quack” or a “smooth, plausible gentleman” whose doings are not for our entertainment, but rather, at our expense. Similarly, when we listen to a courtier’s mannered words, an old friend’s sympathetic advice, or a swindler’s enticing promises, we may cautiously judge the worth of these statements.

In contrast, the legal system demands of a judge more than a decision about whether to applaud. We hold lawyers to professional and ethical standards when they plead a legal claim or defense on behalf of a client. Moreover, discovery, summary judgment procedures, and applicable rules of evidence at a trial will ideally uncover more reliable information about the merits of a claim. Yet, assessing “plausibility” at the initial pleading stage, before discovery, may force judges to size up a person’s “plausibility”—or rather, “applaudability”—as they would in a social or business setting.

### III. LESS APPLAUSE-WORTHY ALTERNATIVES: “REASONABLE,” “STRONG,” AND “CONVINCING”

If the Supreme Court needed to define a heightened standard for civil pleading, then choosing “plausible” as the standard is preferable to other word choices, which might have caused far more concern. To start, consider the myriad uses for the workhorse term “reasonable.” For example, the Court’s qualified immunity decisions lifted the word “reasonable” from familiar uses in the Fourth Amendment context, and began applying it to all § 1983 constitutional-tort suits against executive officers.<sup>38</sup> The Court

<sup>35</sup> WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, THE PRINCE OF DENMARK* act 1, sc. 4, ll. 30-31 (J.J.M. Tobin ed., Wadsworth, Cengage Learning 2012).

<sup>36</sup> WILLIAM SHAKESPEARE, *ALL’S WELL THAT ENDS WELL* act 1, sc. 2, ll. 53-55 (Sir Arthur Quiller-Couch & John Dover Wilson eds., Cambridge Univ. Press 1965).

<sup>37</sup> *Latin Definition for: Plausibilis, Plausibilis, Plausibile*, LATDICT, <http://www.latin-dictionary.net/definition/30685/plausibilis-plausibilis-plausibile> (last visited Apr. 8, 2014).

<sup>38</sup> See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982)). See generally 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights secured by the Constitution and laws, shall be liable to the party injured . . .”).

recognized an affirmative defense for officials who violate a plaintiff's constitutional rights, if the officials can show that they acted in a way that was objectively "reasonable" to an official in light of "clearly established" law in place at the time.<sup>39</sup> That usage gives judges authority to dismiss civil rights cases early on in litigation, based on their judgment that any constitutional violation might have nevertheless been tolerable.

In habeas corpus litigation, the word "reasonable" may do double, triple, or even quadruple duty when analyzing a prisoner's constitutional claim—and for each separate usage, the word is used in a very different sense.

First, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a requirement on state habeas petitioners to show that a state court adjudicated their claims "contrary to . . . clearly established Federal law," or at least in a manner that "involved an unreasonable application of clearly established Federal law."<sup>40</sup> The Supreme Court noted in *Williams v. Taylor* that "[t]he term 'unreasonable' is no doubt difficult to define," but the Court nevertheless maintained that a decision must be more than "incorrect," it "must also be unreasonable."<sup>41</sup> Second, an underlying constitutional habeas claim may prompt analysis of whether prior counsel's representation fell below "an objective standard of reasonableness," and whether that inadequate representation had a "reasonable probability" of affecting the outcome.<sup>42</sup> Third, separate harmless-error tests ask whether there is a "reasonable" probability that the error was prejudicial.<sup>43</sup> Finally, the Court's innocence "gateway to defaulted claims" asks whether, based on new evidence of innocence, a "reasonable juror" would find guilt "beyond a

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<sup>39</sup> *Id.*

<sup>40</sup> 28 U.S.C. § 2254(d)(1) (2012).

<sup>41</sup> 529 U.S. 362, 410-11 (2000). More recently, the Supreme Court has sown deep—and, hopefully, unintended and remediable—confusion by implicitly endorsing a formulation that *Williams* rejected as misleading and subjective. In *Harrington v. Richter*, the Court mentioned in dicta that the AEDPA unreasonableness standard asks whether "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with this Court's precedents." 131 S. Ct. 770, 786 (2011). *But see Williams*, 529 U.S. at 409-10 (refusing to define "an unreasonable application" by reference to a "reasonable jurist"). For criticism of the *Richter* decision, see, as an example, Amy Knight Burns, Note, *Counterfactual Contractions: Interpretive Error in the Analysis of AEDPA*, 65 STAN. L. REV. 203, 220-21 (2013), which notes "inconsistency and incoherence lurking in the *Richter* opinion."

<sup>42</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>43</sup> *See generally, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (establishing a federal habeas harmless-error standard that bars habeas relief when a constitutional error had no "substantial and injurious effect," or when no "actual prejudice" resulted). Furthermore, as noted above, the Court defines "prejudice" for ineffective assistance of counsel claims as that which creates a "reasonable probability" that an error affected the habeas petitioner's outcome in the original case. *See, e.g., Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *see also supra* note 42 and accompanying text.



reasonable doubt.”<sup>44</sup> Overall, habeas corpus review is replete with the very different roles and meanings assigned to the word “reasonable.” Justice Scalia has commented that such doctrines create “ineffable gradations of probability . . . beyond the ability of the judicial mind (or any mind) to grasp.”<sup>45</sup>

Sometimes a standard explicitly calls for a higher probability—but still may not define it precisely. For example, in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the Supreme Court explained that for pleadings under the Private Securities Litigation Reform Act, “[t]o qualify as ‘strong[,]’ . . . an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.”<sup>46</sup> Yet, the Court notes that “Congress left the key term ‘strong inference’ undefined.”<sup>47</sup> Similarly, the Court’s recent intervention into class action litigation in *Wal-Mart Stores, Inc. v. Dukes* described the need for “convincing proof” to support class certification.<sup>48</sup> However, since “convincing,” like “plausible” in *Twombly* and *Iqbal*, was not precisely defined, “[t]he majority’s language in *Wal-Mart* has the potential to work the same mischief.”<sup>49</sup>

Perhaps standards about certainty are clearer when they refer to an accepted standard of proof, like “a preponderance of the evidence” or “beyond a reasonable doubt.” In those contexts, there is judicial experience in considering the relevant standards, and deference to decisions of factfinders when applying them in the first instance. In contrast, efforts to erect new threshold standards (e.g., based on the terms “reasonable,” “strong,” or “convincing”) raise special challenges. The word “plausible” may be vague and susceptible to contradictory meanings, but at least it does not risk creating a false veneer of judicial objectivity or certainty.

## CONCLUSION

The new “plausibility” standard places great discretion in the hands of judges, who, as the Supreme Court explained in *Iqbal*, must draw on “experience and common sense.”<sup>50</sup> One scholar bemoans the word “plausible”

<sup>44</sup> *House v. Bell*, 547 U.S. 518, 536–37 (2006).

<sup>45</sup> *United States v. Dominguez Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring).

<sup>46</sup> 551 U.S. 308, 314 (2007).

<sup>47</sup> *Id.*

<sup>48</sup> 131 S. Ct. 2541, 2556 (2011).

<sup>49</sup> Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 35 (2011).

<sup>50</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Defining judicial experience and its relevance to “plausibility” assessments provides yet another challenge. See generally Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial*

as simply “too general a word to be the basis of a judge-made revolution involving pleading and open access to courts.”<sup>51</sup> Thus, Professor Kaplow labels the “plausibility” standard “unclear, question-begging in key respects, and at bottom open-ended.”<sup>52</sup> These concerns all invite a normative assessment: if no words can clearly express a judge’s task, perhaps that task should not be performed at all.

Exploring the contradictory meanings of “plausibility” does not resolve its definitional paradoxes, but does help to clarify them. The Court chose a word that candidly admits its competing meanings. In contrast, the much used and abused “reasonable” may suggest a misleading sense of precision. Had the Court gone down the same road to raise the bar for pleading standards, but selected “reasonable” or “probable” or other such terms, the consequences might have been far more problematic.

A swindler may appear trustworthy, while an innocent may falsely confess. Facts alleged in a pleading may be accurate or superficial. Similarly, a judge’s decision about whether to accept a pleading may or may not appear “plausible.” As a result, the chief virtue of the new “plausibility” standard is the transparency of its vice.

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*Experience*, 56 VILL. L. REV. 857, 871-78 (2012) (critiquing the Court’s reliance on “judicial experience” by highlighting its failure to explain the term).

<sup>51</sup> Edward Brunet, *The Substantive Origins of “Plausible Pleadings”*: An Introduction to the Symposium on *Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1, 9 (2010).

<sup>52</sup> Kaplow, *supra* note 19, at 1297.